

IN THE UTAH COURT OF APPEALS

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State of Utah, in the interest)	MEMORANDUM DECISION
of C.D., A.D., J.T., and S.T.,)	(Not For Official Publication)
persons under eighteen years)	
of age.)	Case No. 20070978-CA
_____)	
)	
A.D.T.,)	F I L E D
)	(March 27, 2008)
Appellant,)	2008 UT App 62
)	
v.)	
)	
State of Utah,)	
)	
Appellee.)	

Seventh District Juvenile, Monticello Department, 170258
The Honorable Mary L. Manley

Attorneys: Joyce G. Smith, Blanding, for Appellant
Mark L. Shurtleff and John M. Peterson, Salt Lake
City, for Appellee
Martha Pierce, Salt Lake City, Guardian Ad Litem

Before Judges Thorne, Bench, and Billings.

PER CURIAM:

A.D.T. (Mother) appeals the juvenile court's order adjudicating her children as abused and neglected. We affirm in part and set specific issues for further briefing.

Mother first asserts that the juvenile court erred in admitting factual testimony from a witness who was not designated as an expert witness. A trial court "has broad discretion in determining whether to allow a witness to testify and this court will not reverse such ruling unless it abused that discretion, substantially affecting [Appellant's] rights." In re A.M.S., 2000 UT App 182, ¶ 16, 4 P.3d 95. In order to determine whether the juvenile court abused its discretion, this court considers whether the testimony could have been reasonably anticipated or whether it constituted unfair surprise. See Gerbich v. Numed, Inc., 1999 UT 37, ¶ 16, 977 P.2d 1205. The record demonstrates

that the witness was designated as a fact witness and testified only to factual matters. Because the witness was designated as a fact witness, Mother could have reasonably anticipated that the witness would be called to testify to factual matters. Thus, we cannot say that the juvenile court abused its discretion in allowing the witness to testify to purely factual matters.

Mother also asserts that there was insufficient evidence that her children's testimony would be unreliable if she remained present during their testimony. When an appeal is made on the grounds of sufficiency of the evidence, this court reviews the juvenile court's factual findings for clear error. See In re E.R., 2001 UT App 66, ¶ 11, 21 P.3d 680. This court will not reweigh evidence so long as there is an evidentiary basis for the juvenile court's finding in the record. See In re B.R., 2007 UT 82, ¶ 12, 171 P.3d 435.

Rule 37A(b) of the Utah Rules of Juvenile Procedure provides that upon a finding that a child will suffer serious emotional or mental strain if required to testify in a party's presence, or that the child's testimony would be unreliable, the party may be excluded from the courtroom while the child testifies. See Utah R. Juv. P. 37A(b). Mother asserts that there was no evidence to support the juvenile court's finding that the children would not testify reliably in her presence. However, there was sufficient testimony that it would be difficult for the children to testify credibly in her presence. The witness testified that the children would be concerned about hurting their Mother's feelings or criticizing her in her presence. Thus, because there was an evidentiary basis supporting the juvenile court's finding, the finding is not clearly erroneous.

Mother next challenges the sufficiency of the evidence supporting the juvenile court's determination that the Division of Child and Family Services (DCFS) made active efforts to prevent the breakup of the Indian family and failed to adequately comply with the Indian Child Welfare Act (ICWA). See 25 U.S.C. §§ 1901 et seq. (2006). In state court proceedings regarding the custody of a child who is a member of an Indian tribe, the tribe and the Indian custodian must be given notice of the proceeding and an opportunity to intervene. See id. § 1912(a). Additionally, in order to justify a removal from an Indian custodian, the juvenile court must find by clear and convincing evidence that continued custody by the Indian custodian "is likely to result in serious emotional or physical damage to the child." See id. § 1912(e). DCFS must also demonstrate that it made active efforts to prevent the break up of the Indian family and that the efforts have been unsuccessful. See id. § 1912(d). Furthermore, certain preferences when placing the children in

foster homes are required unless good cause is shown. See id.
§ 1915(b).

Here, the record shows that notice was sent to the Navajo tribe, providing notification of the ongoing proceedings and the opportunity to intervene. The Navajo tribe did not respond or attempt to intervene. Additionally, at trial, testimony was provided by two experts, both opining that returning the children to their Navajo grandfather would likely result in serious emotional and physical harm. Thus, the juvenile court made this required finding under the ICWA.

However, the issue of the juvenile court's compliance with other ICWA requirements warrants further briefing. Accordingly, briefing is requested on the following issues: (1) whether the juvenile court properly determined that DCFS made active efforts to prevent the break up of the Indian family, and (2) whether the juvenile court complied with ICWA regarding applying the required preferences in the placements of the children.

Accordingly, the briefing schedule on these issues will proceed and will be provided by separate order. The juvenile court's order is affirmed as to the other issues identified in the petition on appeal.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Judith M. Billings, Judge